

JUL 14 1978

MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-1915

Blanche David,
Petitioner

v.

State of California, Cecil E. Pope & Margaret S.
Pope, Cecil E. Pope & Margaret S. Pope, and Their
Insurers of Contingent Liabilities,
John A. Putkey, Duane E. Clapp, Jr.,
Richard B. Melbye,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Blanche David, Proprie Persona
2826 Tiburon Way
Burlingame, California 94010
Petitioner, Per Se

BEEHIVE PRINTERS 588-5673

ADDENDUM

**ADDENDUM
APPENDICES**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BLANCHE DAVID,

Plaintiff,

-vs-

No. C-73-2002 SC

F I L E D

JAN 25 1974

J S - 6

STATE OF CALIFORNIA, CECIL and
MARGARET POPE and their insurers of
contingent liabilities, JOHN A. PUTKEY,
DUANE E. CLAPP, Jr. AND RICHARD B. MELBYE,

Defendants.

ORDER GRANTING
DEFENDANTS'
MOTION TO
DISMISS

This matter is before the court on the
following motions:

(1) Defendant State of California's
motion to dismiss;

(2) Defendants Melbye's and Clapp's
motion for summary judgment or in the alter-
native motion to dismiss; and

(3) Defendant Putkey's motion for sum-
mary judgment or in the alternative motion to
dismiss.

The action arises from a San Mateo Super-
ior Court action filed by a Mr. and Mrs. Pope
against Blanche David and several Doe defendants.
That proceeding dealt with claims by the Popes
that rain water had been diverted on to their
property, causing their home to be undermined.
Blanche David failed to respond (she claimed

that she had never been served). A default judgment in the sum of \$7,000.00 was subsequently entered against her. The Superior Court denied her relief when she petitioned it to set aside the judgment. The Court of Appeals affirmed and the California Supreme Court denied a hearing.

Plaintiff (in this action) Blanche David, now seeks redress in this court for relief from the default judgment. She has named as defendants the State of California (based upon the decisions rendered by the State's judiciary); Mr. and Mrs. Pope; Insurers of contingent liabilities for the Popes (unknown at this time); and John A. Putkey, Duane E. Clapp, Jr. and Richard B. Melbye (attorneys for the Popes at various stages of the state court proceedings).

Plaintiff, in alleging violations of her civil rights, cites numerous reasons for the relief sought, though most involve matters unrelated to the entry of the default judgment itself. Her contention is that she was not served, and hence the trial court was without jurisdiction to enter the default judgment.

(1) Defendant State of California has filed a motion to dismiss on the grounds that under the Eleventh Amendment federal courts lack jurisdiction over cases brought by citizens against a sovereign state, and that the state is immune from suit under the Civil Rights Act since it is not a "person", as prescribed by the Act.

The State's position with respect to the lack of jurisdiction of federal courts over actions by a citizen against a state is supported by *Hans v. State of Louisiana*, 134 U.S.1 (1890). Further, the Ninth Circuit has held that "the State of California is immune from

suit without its consent, and that immunity extends to suit against it under the Civil Rights Act." (*Bennett v. People of the State of California*, 406 F.2d 36 (9th Cir.1969)). Defendant State of California's motion to dismiss is therefore granted.

(2) Defendants Melbye and Clapp move for summary judgment, or, in the alternative, to dismiss, on the basis that they played no role in the taking of the default. They aver that they represented the insurance carrier of the Popes in the state court action, several months after the default judgment was entered, and only then in connection with proceedings against a different defendant. They list several other grounds for dismissal: (1) lack of subject matter jurisdiction, since plaintiff does not alleged at least \$10,000 in damages (only \$7,000); (2) since an adequate state remedy was available and was invoked, the final judgment is res judicata with respect to the issues decided; and (3) prosecuting attorneys' acts performed in connection with his quasi-judicial capacity are immune from suit under the Civil Rights Act.

Plaintiff makes several points in rebuttal. First, defendants Melbye and Clapp knew of the situation and took advantage of it. Second, res judicata is inapplicable because the state courts never did have jurisdiction. Finally, defendants' reliance on the immunity theory is unfounded because the cases cited deal solely with immunity of public officials.

".....It is a principle as old as our dual state and federal judicial systems that a federal court is without jurisdiction to interfere with a judgment in a state court action in which the

state court had jurisdiction of the subject matter and of the parties thereto. It is only when the judgment of a state court is void either because that court lacked jurisdiction of the subject matter or of the parties to the action, or because it entered a judgment which it had no power to enter under the law, that such judgment may be reviewed in a federal court."

Daniels v. Thomas, 225 F.2d 295
(10th Cir.1955), p.797

If plaintiff in fact was not served properly, the state court did not acquire jurisdiction over her; hence this court could review the judgment and enter an order granting appropriate relief. At present, the court can make no determination on the issue of service because of the inadequacy of the record before it.

In a proceeding merely to review the state court judgment, however, attorneys Melbye and Clapp are not proper defendants. Their only connection with the dispute involved legal representation of one of the parties. Thus, any order relieving plaintiff from the default would be directed solely at the Popes (the original plaintiffs in the state court action).

Since plaintiff cannot sustain an action against these attorneys on the ground that the state court lacked jurisdiction, her complaint must necessarily alleged a wholly independent cause of action against them. Allowing for a liberal interpretation of the pleadings, as is proper when a party is proceeding in propria persona, the court can discern allegations of an action possibly based on malicious prosecution.

To maintain such action plaintiff must demonstrate that federal jurisdiction has been properly invoked. This she has not done. Since no federal question is involved, the action must be based on diversity principles. But the complaint indicates that these two defendants are citizens of this state, as is plaintiff. Further, plaintiff has not even satisfied the \$10,000 jurisdictional minimum. Therefore, this court does not have jurisdiction to entertain plaintiff's action against defendants Melbye and Clapp. Defendants' motion to dismiss is, therefore, granted.

(3) Defendant Putkey has also moved for summary judgment or in the alternative to dismiss. Since his participation in the taking of the default judgment was limited to legal representation of the Popes, his situation is similar to that of defendants Melbye and Clapp. Since plaintiff cannot maintain an action against Melbye and Clapp, she is similarly precluded from proceeding against Putkey. Thus, defendant Putkey's motion to dismiss is also granted.

It is, therefore, hereby ordered as follows:

(1) Defendant State of California's motion to dismiss is granted;

(2) Defendants Melbye's and Clapp's motion to dismiss is granted;

(3) Defendant Putkey's motion to dismiss is granted.

Dated: January 24, 1974.

/s/ SAMUEL CONTI
United States District Judge

A-17

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BLANCHE DAVID,)	"FILED JUL 26 1974
)	CLERK, USDC"
Plaintiff,)	No. C-73-2002 SC
)	
-vs-)	
)	
STATE OF CALIFORNIA, et al.,)	<u>ORDER</u>
)	
<u>Defendants.</u>)	

This is a complaint challenging a default judgment entered in the State of California Superior Court, County of San Mateo. The matter is before the court on the motion of defendants Cecil E. Pope and Margaret S. Pope for summary judgment or, in the alternative, to dismiss.

The defendants Pope are the only remaining defendants in an action which originally named also the State of California and several attorneys as defendants. The Popes seek to dismiss the action as against them on the basis that this court lacks subject matter jurisdiction.

This action essentially involves a challenge, based upon due process principles, to a default judgment entered in San Mateo Superior Court against the plaintiff in this action. To sustain this litigation there must be a sufficient federal jurisdiction basis. As Professor Moore states:

"An action to enjoin a state judgment on the ground that it violates procedural due process presents a general federal question, and, if the matter in controversy

A-18

exceeds \$10,000, exclusive of interest and costs, there is jurisdiction."

7 Moore's Federal Practice, p. 363-364.

The complaint alleges that the default judgment amounted to \$7,000.00. Reference is also made to \$9,000.00, although it is difficult to understand exactly what this sum represents. In any event, neither figure meets the \$10,000 jurisdictional pre-requisite for federal court. Thus, this court lacks subject matter jurisdiction.

Decision and Order:

It is, therefore, ordered that defendants Cecil E. Pope and Margaret S. Pope's motion to dismiss is granted. Since this eliminates the remaining defendants, the action is hereby dismissed in its entirety.

Dated: July 26, 1974

STAMPED "SAMUEL CONTI"
United States District Judge